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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. 711

National Bulk Carriers, Inc., in personam, and the SS "BULKCRUDE", in rem,
Petitioners,

v.

Mrs. Valerie Jean Gardner, as Administratrix of the Estate of Robert Edward Gardner, Jr., Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AND APPENDIX

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Mrs. Valerie Jean Gardner, as Administratrix of the Estate of Robert Edward Gardner, Jr., Deceased,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners in the above entitled cause pray that a writ of certiorari issue to review the amended majority opinion of the United States Court of Appeals for the Fourth Circuit, filed pursuant to an order entered in said cause on October 26, 1962.

CITATION TO OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia, Norfolk Division, exonerating petitioners is reported at 190 F. Supp. 143. It is printed at pages 1-9 in the appendix hereto. The United States Court of Appeals for the Fourth Circuit, in two opinions, reversed and remanded. Its first opinion is reported in the advanced sheets of the Federal Reporter, Second Series, at 305 F. (2d) 515. It is printed at page 9 in the appendix hereto. This opinion is not reported in the bound volume of 305 F. (2d). In that publication under the caption "Cases Reported" appears the following: "Gardner v. National Bulk Carriers, Inc., 305 F. (2d) 515. Withdrawn by Order of Court." Its amended majority opinion and the dissenting opinion, as of this time, are unreported. They are printed in the appendix to this petition, the amended majority opinion at page 18 and the dissenting opinion of Circuit Judge Haynsworth at page 26.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 United States Code Annotated, Section 1254(1).

QUESTIONS PRESENTED

This petition for a writ of certiorari presents two basic questions which petitioners submit are of vital interest and should be considered and passed upon by this Court, in order that there may be unanimity in future decisions.

FIRST: Whether the amended majority opinion of the Court of Appeals violates the doctrine enunciated by this Court in McAllister v. United

States, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20.

SECOND: Whether the amended majority opinion of the Court of Appeals is in conflict with Miller v. Farrell Lines, (2 Cir. 1957), 247 F. (2d) 503, certiorari denied 355 U.S. 912, 78 S. Ct. 342, and Barrios v. Waterman Steamship Corp., (5 Cir. 1961) 290 F. (2d) 310.

STATUTES INVOLVED

The principal statute involved is 46 United States Code Annotated, Section 688, known as the Jones Act (appendix page 42), which incorporates the provisions of 45 United States Code Annotated, Section 51, et seq. (known as the Federal Employers Liability Act or F. E. L. A.), thus making the F. E. L. A. applicable to shipowners and merchant seaman.

STATEMENT OF THE CASE

This is an action in admiralty involving "search and rescue", brought pursuant to the provisions of Section 33 of the Merchant Marine Act of 1920, commonly known as the "Jones Act", Title 46, United States Code Annotated, Section 688, wherein the administratrix of the estate of Robert Edward Gardner, Jr., brought suit against National Bulk Carriers, Inc., owner of the Steamship "BULKCRUDE", in personam, and the Steamship "BULKCRUDE", in rem, to recover for the death of her decedent. Petitioners were the respondents appellees in the Court of Appeals. The appendix to petitioners' brief filed

with the Court below, sometimes referred to in this petition as "Respondents'—Appellees' Appendix (Bulkcrude)", is included in the "Transcript of Record" sent to this Court by the Clerk of the Circuit Court of Appeals for the Fourth Circuit. Petitioners' "Petition for Rehearing" filed with the Court of Appeals is also included in the said "Transcript of Record."

The evidence was heard by the District Court over a five-day period ending on October 12, 1960, the greater part of which was taken in open court, thereby giving the District Judge an opportunity to observe the demeanor of the witnesses. Basically there was little conflict in the testimony offered on behalf of libellant and respondents.

Gardner signed aboard the "BULKCRUDE" for the voyage in question on December 4, 1958, at New York, in the capacity of A.B. seaman. He was assigned to the 12 to 4 watch, serving thereon each day from midnight to 4:00 A.M., and from noon to 4:00 P.M. On December 8, 1958, at 2330 (11:30 P.M.), while the vessel was proceeding along the Florida Straits, Gardner, when called to report for his midnight watch, could not be located. In the forenoon of that day Gardner had appeared at the office of the master of the "BULKCRUDE" and reported that he felt shaky. He explained that he had previously done quite a bit of drinking, was suffering from the effects thereof, and was considering leaving the vessel for a medical check-up upon its arrival at Corpus Christi. Captain Chaffin, master of the "BULKCRUDE", supplied Gardner with medicines and directed that he be relieved of his afternoon watch, 1200 to 1600 hours (noon to 4:00 P.M.) on December 8, and also his night watch, 0000 to 0400 hours (midnight to 4:00 A.M.) December 9,

1958; however, Gardner later advised that he would stand his midnight watch. Gardner had last been seen by his forecastle mates at about 1800 (6:00 P.M.) December 8. A thorough search of the vessel which was promptly made, commencing at 11:30 P.M., December 8, 1958, and completed at 0100 (1:00 A.M.) December 9, 1958, failed to locate Gardner. At 0040 (12:40 A.M.) December 9, prior to the completion of the search, the master of the "BULK-CRUDE" sent the following wireless message to the Coast Guard at Miami, Florida, which was received by the Coast Guard at 0054 (12:54 A.M.) December 9:

> "Seaman Robert E. Gardner missing from the SS Bulkcrude KBXM Last seen about 1800 Vicinity Tennessee Reef 24-42 N 80-44 W Stop First Missed at 2330 when called for watch All searches have been to no avail Please advise Chaffin master."

The Coast Guard at Miami radioed the following reply at 0105 (1:05 A.M.) December 9:

> "SS Bulkcrude Will issue broadcast to all shipping vicinity to be on lookout in case seaman went overboard Commander Seventh Coast Guard District."

The Coast Guard then made the following emergency "All Ships Broadcast" at 0117 (1:17 A.M.) December 9, and repeated the same at its regular broadcasts twice thereafter:

> "All shiping Straits of Florida SS Bulkcrude advises seaman missing X Last seen on board about 082300Z vicinity Tennessee Reef 24-42 N 80-44 W X Keep sharp lookout possible man overboard Commander Seventh Coast Guard District."

When navigating in tropical waters, it is common practice for crew members to sleep on deck or elsewhere rather than in their quarters, which in this instance was the forecastle. Therefore, the "BULKCRUDE" was not stopped while the search for Gardner was made, and such action is not customary. See Respondents'—Appellees' Appendix (Bulkcrude) as follows:

Captain McIntyre pages 43 and 44

Captain Prengel pages 79 and 80

Captain Adams pages 91 and 92

Between 1800 (6:00 P.M.) December 8, when Gardner was last seen, and 2330 (11:30 P.M.) December 8, when he was first missed, a period of 5½ hours, the vessel had travelled a distance of 85 miles, and between 1800 (6:00 P.M.) December 8, when he was last seen, and 0100 (1:00 A.M.) December 9, when the search of the vessel was completed, a period of 7 hours, the vessel had travelled a distance of 105 miles on a dark night through coastal waters with strong varying currents. See Respondents'-Appellees' Appendix (Bulkcrude) as follows:

Captain McIntyre page 35

Captain Prengel page 76

Captain Adams page 87

District Court's Opinion page 148

See also Dissenting Opinion of Circuit Judge Haynsworth, page 26 of appendix to this petition.

At the completion of the search of the vessel a conference was held by the master of the "BULKCRUDE" with his chief mate. After fully considering all of the pertinent facts including the lapse of time since Gardner was last seen, the distance the ship had travelled during this interval, the darkness of the night, that no one knew when or where Gardner went overboard, if at all, and that at some points along the vessel's route since Gardner was last seen the drift of the current was offshore and at others it was inshore, it was decided that there would be no reasonable possibility of locating Gardner by turning the vessel around and attempting a search of the waters while retracing a reciprocal or parallel course, even if he had survived the many known dangers to be encountered by going overboard, including, among others, contact with the vessel's propeller and attack by sharks and barracuda, numerous in that area. Eight witnesses testified as to whether or not, on the facts in this case, there would have been a reasonable possibility of rescuing Gardner, had the vessel been turned back and a search conducted, either at 11:30 P.M., when he was first missed or at 1:00 A.M., December 9, when search of the vessel was completed and he could not be located, six for respondent and two for libellant.

The witnesses testifying on behalf of the respondent were well qualified masters with experience in matters of this kind and all were positive that it would have been useless for the master of the "BULKCRUDE" to turn back and conduct a search after Gardner had been reported missing because there was no reasonable possibility of rescuing him, under the conditions that existed that night.

The Coast Guard Watch Officer in Miami, who received the message from the master of the "BULKCRUDE"

that Gardner was missing, testified that he did not order a search for Gardner because it was night and because it was not known when or where Gardner went overboard.

Two witnesses testified for libellant on this point. One was Captain Edwin B. Ing, United States Coast Guard, who was Chief of the Search and Rescue Section for the Fifth Coast Guard District, comprising the States of Virginia, Maryland and North Carolina and the waters adjacent thereto, and the other was Stanley Livingston, a retired tugboat captain, who so far as the record shows, was without experience in situations involving rescue at sea. The testimony of libellant's witness, Captain Ing, fully supported that of the experts testifying for respondents, that is, that on the facts in this case, there was no reasonable possibility of rescuing Gardner had the master of the "BULKCRUDE" turned back and attempted a search. Captain Ing further testified that, had he been Watch Officer for the Coast Guard at Miami when the message from the master of the "BULKCRUDE" was received, he would not have ordered a search for Gardner because of the low probability of finding him, and such search as might have been ordered the next day would not have been an extensive one. He further testifid that it would have been practically impossible to see a man in the water at night unless the man was equipped with special signalling equipment.

The above left the libellant with no testimony in support of her contention that the master of the "BULKCRUDE", upon learning that Gardner was missing, should have turned the vessel around and attempted a search, except Captain Livingston, the retired tugboat captain. After testifying that he believed if the vessel had turned back

that night the probabilities of finding the missing seaman were good, Captain Livingston so qualified this conclusion as to make it completely worthless. He testified, (petitioners' ("BULKCRUDE's") petition for rehearing, page 23) as follows:

> "As long as that man is alive and he's wiggling in the water; it seems to me like he'd be able to do it almost as well at night as you could in the day."

There was no evidence that the missing seaman was alive and wiggling in the water. Captain Livingston also admitted the serious effect of the varying currents in that area, stating that if an object went into the water which did not immediately sink, there was no way of knowing its drift unless you knew approximately where it went overboard, (petitioners' ("BULKCRUDE's") petition for rehearing, page 23). There was no evidence as to where or when Gardner went overboard, or that he went overboard at all. Therefore, basically Livingston's testimony supported the experts testifying for this petitioner and the testimony of libellant's expert, Captain Ing, of the Coast Guard.

On December 29, 1960, the District Court, the Honorable Walter E. Hoffman, who had seen and heard the witnesses testify, concluded that on the record in this case, there would have been no reasonable possibility of rescuing Gardner had the "BULKCRUDE" been turned back and a search conducted; that there was no negligence on the master, and that the libel should be dismissed. The District Court, in its opinion, at page 8 of the appendix to this petition, said:

> "Holding that, under the peculiar facts of this case, the master of the 'BULKCRUDE' was not negligent in failing to reverse his course for the purpose of conducting a search, and that, in any event, there was no reasonable possibility of success and, hence, there was no causal relations between the negligence, if any, and the death, a decree will be entered dismissing the libel."

In reaching this conclusion the District Court relied upon and quoted from *Harris* v. *Pennsylvania R. Co.*, (4 Cir. 1931) 50 F. (2d) 866, where at pages 868 and 869, Judge Soper, in speaking for the Fourth Circuit, said:

> "These obvious facts lead us to conclude that there was evidence of neglect on the part of the crew, and further that *it was for the jury to decide whether the man could have been saved if due diligence had been used.* * * *. Whether in any event he would have succeeded is not a certainty, but in our view *there was enough testimony tending to show a reasonable probability of rescue, had a life ring or heaving line been used, to justify the submission of the question to the jury.*" (Italics supplied).

Nothing could be plainer than that the Fourth Circuit in *Harris* v. *Pennsylvania R. Co., supra*, relied upon in the instant case by the District Court and the Court of Appeals as well, holds that in cases of this type, the question of whether there was a reasonable probability of rescue is for the jury to decide. In this admiralty case the findings of the District Court as trier of the facts were equivalent to those of a jury.

From the decree of the District Court dismissing the libel the libellant appealed.

October 10, 1961, the Circuit Court of Appeals, three judges sitting, first heard argument. No opinion was rendered by that Court.

May 28, 1962, pursuant to an order duly entered, the case was reargued before the Circuit Court of Appeals, five judges sitting en banc. Judge Soper who was the author of the opinion in the *Harris* case in which the doctrine of search and rescue first originated, and who sat on the three judge Court which did not render an opinion in the instant case, was not a member of the en banc Court which finally acted.

July 31, 1962, the Court of Appeals filed its first opinion. The en banc Court after expressly approving the doctrine laid down by Judge Soper in the *Harris* case that before the defendant can be held liable there must be a reasonable probability of rescue and such question is for the jury, reversed the findings of the District Court that on the evidence in this case there was no reasonable possibility or probability of rescuing Gardner. A petition for a rehearing was timely filed on behalf of petitioners.

October 26, 1962, the Court of Appeals, after considering the aforesaid petition for rehearing, denied the same, filed an amended opinion correcting numerous errors in its first opinion, but nevertheless reversed the District Court. Simultaneously therewith Circuit Judge Haynsworth, a member of the said Court, filed a dissenting opinion.

Listed below are the pertinent changes made by the Court of Appeals in its amended majority opinion:

FIRST OPINION	AMENDED OPINION
(1) Page 2 (See appendix this petition page 10). "In addition, there was *general agreement among the expert witnesses who testified* at the trial that, under the environmental conditions existing that night, a man in the water might have survived and been saved by a reasonable search. * * *." Italics supplied.	(1) Page 2 "In addition, there was *expert testimony* at the trial that under the environmental conditions existing that night, a man in the water might have survived and been saved by a reasonable search. * * *." Italics supplied.
(2) Pages 5-6 (See appendix this petition page 13). "The master's dereliction in failing to search the waters was aggravated by other conduct. For example, his wireless message to the Coast Guard advising it of the seaman's plight was uninformative. It stated: SEAMAN ROBERT E. GARDNER MISSING FROM THE SS BULKCRUDE KXBM LAST SEEN ABOUT 1800 VICINITY TENNESSEE REEF 24 42N 80.44W STOP FIRST MISSED AT 2330 WHEN CALLED FOR WATCH ALL SEARCHES HAVE BEEN TO NO AVAIL PLEASE ADVISE.' Omitted was the vital information concerning speed and course of the vessel since the seaman was last seen."	(2) All of the language from the First Opinion quoted opposite hereto was stricken from the Amended Opinion.

(3) Page 6 (See appendix this petition page 13).

"Further, the master could have acted to notify other ships he knew to be in the area, but he neglected to do so. * * *."

(3) All of the language from the First Opinion quoted opposite hereto was stricken from the Amended Opinion.

(4) Page 6 (See appendix this petition page 13).

"* * *. Although the night was dark and the tides irregular, the waters were warm (80°) and calm, there was little or no wind, and there was a reasonable possibility that other vessels, correctly advised, might have found him. The master was content to leave this to the Coast Guard and then sat idly by as it sent the following message: 'ALL SHIPPING STRAITS OF FLORIDA SS BULKCRUDE ADVISES SEAMAN MISSING X LAST SEEN ON BOARD ABOUT 082300Z (8th December at 11:00 p.m.) VICINITY TENNESSEE REEF 24-42N80-44W X KEEP SHARP LOOKOUT POSSIBLE MAN OVERBOARD.' The message erroneously states that the seaman was last seen at 11:00 p.m., and this missinformation could well have caused the other ships unwarrantedly to limit their search to a small area around Tennessee Reef and to miscalculate the drift of the seaman while in the water. The master did nothing to make a correction or to give more specific information."

(4) All of the language from the First Opinion quoted opposite hereto was stricken from the Amended Opinion.

(5) Page 6 (See appendix this petition page 14)

"Taken in combination, the master's conduct, both of commission and omission, shows an inexcusable disregard of his serious responsibility to a crewman."

(5) All of the language from the First Opinion quoted opposite hereto was stricken from the Amended Opinion.

After deleting from its amended opinion three of the four charges of the master's negligence so strongly relied upon in its first opinion, this left only one charge of negligence levelled against the master in the amended opinion, namely, his failure to turn back and conduct a search for the missing seaman.

The Court of Appeals in its amended majority opinion admits that the decisive question in this case is what was the master's duty under the circumstances with which he was confronted after being advised that Gardner was missing. Stating that it is mindful of other Circuit Court decisions excusing the master's failure to search the waters, it cites in support thereof *Miller* v. *Farrell Lines*, 247 F. (2d) 503 (2 Cir. 1957) and *Barrios* v. *Waterman S. S. Corp.*, 290 F. (2d) 310 (5 Cir. 1961), and then says:

> "* * *. *Unless a search was made by that or other vessels in the area, it could not be determined that Gardner was beyond rescue.* * * *
>
> "* * *. A master who abandons a missing seaman while there is yet a *reasonable* opportunity to save him acts at his own risk." Italics supplied.

In disregard of the overpowering evidence that there was no reasonable possibility of rescuing this missing seaman had the master turned back and conducted a search, together with the findings of the District Court to this effect, the Court of Appeals, in its majority amended opinion, concludes that had the master turned back and conducted a search there would have been a reasonable possibility of rescue and that his failure to make this search was negligence proximately contributing to Gardner's death. The error of the Appeals Court is nowhere better described than in the dissenting opinion of Judge Hayns-

worth, page 26, appendix this petition, to which we invite this Court's most careful consideration. After stating that it was apparent that none of the witnesses assumed that Gardner went overboard soon after he was last seen; that their difficulty arose out of the fact they had no basis for assuming where he went overboard; that there was general agreement among the said witnesses that because of the cross currents and the darkness of the night there was little or no point in the "BULKCRUDE'S" reversing her course, Judge Haynsworth said:

> "* * *. Since McAllister v. United States, 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20, it is plain that this Court has no power to try the factual issues de novo, or to subsitute its appraisal of the facts for that of the District Court when the District Court's findings are not clearly erroneous. * * *.
>
> "* * *. On the contrary all of the respondent's witnesses and one of the two witnesses for the libellant agreed that a search and rescue effort was hopeless under the circumstances which confronted the Bulkcrude's master that night in the light of the darkness of the night and of the fact that he had no basis for a determination of a search area.
>
> * * *
>
> *"I think we exceed the permissible bounds of appellate review when we disregard the abundant testimony supporting the finding that there was no reasonable possibility of rescue of Gardner, or we violate the substantive principle we profess to apply when we*

insist that there was a reasonable possibility of rescue in the face of the contrary finding below and the abundant evidence which supports it." (Italics supplied).

REASONS FOR GRANTING THE WRIT

The reasons for granting this writ have heretofore been given on page 12 of this petition under the caption "Questions Presented". Said reasons will now be discussed in the order there set forth.

FIRST

The Majority Opinion of the Fourth Circuit Completely Ignores McAllister v. United States (1954) 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20.

Previous decisions of this Court, including *McAllister* v. *United States,* supra, have made it crystal clear that Circuit Courts are without the power to try factual issues de novo or to substitute their appraisal of the facts for that of the District Court sitting in admiralty, when the District Court's findings are not clearly erroneous. There is no contention in the amended majority opinion of the Court of Appeals that the District Court's findings are clearly erroneous or that they are without evidence to support them. After hearing the witnesses testify and reaching its conclusion to dismiss the libel, the District Court with full knowledge that the master of the "BULK-CRUDE" had not turned back and attempted a search, in its opinion (appendix this petition page 3), said:

"* * *. In short, the master—when faced with the realization that Gardner was overboard—was confronted with a variety of questions in making his decision not to reverse his course and search for the missing crewman. Among these problems are:

(1) The unknown time when Gardner apparently jumped overboard.

(2) The approximate place that such action took place.

* * *

The Court of Appeals is in error in its finding that the basic premise of the District Court's conclusion that there would have been no reasonable possibility of rescue had the Master of the "BULKCRUDE" turned back and attempted a search was the District Court's inference that Gardner must have gone overboard shortly after he was last seen at 6:00 p.m. The basic premise of the District Court's finding that there was no reasonable possibility of rescuing Gardner, had the Master of the "BULKCRUDE" turned back and attempted a search, is not founded on an inference, but on the variety of reasons given in its opinion and fully supported by the evidence.

Although the evidence in the instant case overwhelmingly supports the master's decision not to turn back because in so doing there would be no reasonable possibility of rescue and the finding of the District Court to this effect, the Fourth Circuit while citing with approval its previous decision in the *Harris* case, supra, that it is for the jury to decide whether the plaintiff has shown there was a reasonable probability of rescue, refused to

accept the finding of the Trial Court whose findings this Court has said have the same effect as the findings of a jury.

Conceding as it does that the master's duty to search does not arise unless there is a reasonable possibility of rescue, (See amended majority opinion page 2, appendix this petition page 18), the Court of Appeals in its first opinion attempted to show that in this case a reasonable possibility of rescue did exist, by the following unwarranted statement:

> "In addition, there was *general agreement* among the expert witnesses who testified at the trial that, under the environmental conditions existing that night, a man in the water might have survived and been saved by a reasonable search." Italics supplied.

On pages 29-36 of Bulkcrude's petition for rehearing (Transcript of Record, page 20), it was convincingly shown that there was no such general agreement among the experts. This resulted in an amended opinion being filed. In dealing with this question in its amended majority opinion, the words "general agreement" in its first opinion were deleted and the words "expert testimony" substituted, the amended majority opinion reading: (appendix this petition page 19)

> "In addition, there was *expert testimony* at the trial that, under the environmental conditions existing that night, a man in the water might have survived and been saved by a reasonable search * * *." (Italics supplied).

The result of the above amendment is that the Court of

Appeals concedes that it erroneously stated in its first opinion that there was general agreement among the experts that under the conditions existing that night a man in the water might have survived and been saved by a reasonable search. It is an admission by that Court that no such general agreement existed. Being confronted with the necessity of attempting to find something in the record to support its conclusion that Gardner might have been saved by a reasonable search, if it was to stand by its original decision to reverse the District Court, the Fourth Circuit, in its amended majority opinion, states that there was "expert testimony" that under the conditions existing that night a man in the water might have survived and been saved by a reasonable search. The opinion then states that libellant's *witness* testified to this effect.

The "libellant's witness", above referred to, is the witness Livingston, whose testimony has heretofore been dealt with in this petition and is dealt with at more length in petitioners' (BULKCRUDE's) petition to the Court of Appeals for a rehearing. That petition also quoted the testimony of petitioners' experts to show further error of the Court of Appeals in its finding that petitioners' experts expressed the opinion that an attempted rescue could hold *hope of success* even with knowledge that Gardner had gone overboard shortly before he was reported missing. These witnesses did not so testify.

Further explanation of all of the above is found in the dissenting opinion of Judge Haynsworth Therein Judge Haynsworth also points out that one of libellant's expert witnesses, Captain Ing., Chief of the Search and Rescue

Section of the Fifth Coast Guard District, testified that it was "almost impossible" to see a man in the water at night, unless equipped with flares or other special signalling equipment, and had he been on duty in Miami he would not have launched a search that night. It is significant that the Court of Appeals in its amended majority opinion chose to completely ignore the testimony of this witness for libellant—perhaps one of the best qualified experts on search and rescue available anywhere.

It is clear from the above that the Court of Appeals in utter disregard of practically uncontradicted evidence that there was no reasonable possibility of rescue and the District Court's finding to that effect, substituted its own appraisal of the facts and came to a conclusion directly opposed to the weight of the evidence and the finding of the District Court.

As so strongly pointed out in the dissenting opinion of Judge Haynsworth, seven of the eight witnesses testifying on the possibility of rescue in this case all testified that under the circumstances that faced the master of the "BULKCRUDE" on the night in question, there was no reasonable possibility of rescue had the master of the "BULKCRUDE" turned back and conducted a search. One of libellant's own experts, the Coast Guard Chief of Search and Rescue, stated that any search held no reasonable possibility of rescue and that it was almost impossible to see a man in the water at night. This man, more qualified in search and rescue than any other witness in this case, and testifying on behalf of libellant, was completely ignored by the majority of the Fourth Circuit. Indeed libellant's other expert even testified that to determine the drift of a body under the conditions that night,

it was necessary to know where along the track of the vessel an object went overboard. The Coast Guard Officer in Miami that received the "BULKCRUDE's" message also testified that under the conditions that night there was no reasonable possibility of rescue. Thus both Coast Guard Officers, well qualified experts, and neutral witnesses in this case, testified that they would not have conducted a search on the night in question, as under the circumstances that night there was no reasonable possibility of rescue. All of "BULKCRUDE"'s expert witnesses, its Captain, and its Chief Officer, a man of forty (40) years sea experience, were firm in their testimony that no reasonable possibility of rescue existed.

In *McAllister v. United States*, supra, this Court at page 8 S. Ct., said:

> "* * *. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. * * *
> A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed' * * *.
> In relation to the District Court's findings we stand in review in the same position as the Court of Appeals. The question, therefore, is whether the findings of the District Court are clearly erroneous."

After concluding in the *McAllister case* that there was substantial evidence to support the findings of the District Court, this Court, at page 9 S. Ct., said:

> "* * *. Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous. Meyers v. Reading Co., 331 U.S. 477, 485-486, 67 S. Ct. 1334, 1339, 91 L. Ed. 1615; Tennant v. Peoria & P. U. R. Co., 321 U.S. 29, 64 S. Ct. 429, 88 L. Ed. 520. We think it was an allowable judgment of the District Court, and the judgment of the Court of Appeals is reversed."

If a Court of Appeals is to substitute its opinion and judgment for that of a District Court that heard the witnesses and had an opportunity to observe their demeanor, the very meaning and purpose behind this Court's decision in *McAllister* v. *United States,* supra, is defeated. In the *McAllister* case this Court said that Courts of Appeals are not to try actions such as that involved in the instant case, de novo, and are not to substitute their opinion for that of the District Court merely because they might disagree with the decision below.

Other findings of fault on the part of the master of the "BULKCRUDE" were set forth in the original opinion of the Court of Appeals, reported in the advanced sheets of the Federal Reporter but withdrawn from the bound volume of that publication, thereby making it necessary that it be set out in the appendix to this petition in order that this Court may have the benefit of the changes. As heretofore shown, these additional findings of fact were deleted from the amended majority opinion of that Court after reconsideration of the case, following the filing by petitioner of its petition for a rehearing. These deletions are further admissions of errors committed by the Court of Appeals. Its original findings were admittedly wrong from their very inception, and as so succinctly shown in

the dissenting opinion of Judge Haynsworth, have not been corrected in its amended majority opinion.

SECOND

The Decision Below Conflicts With The Decision Of The Second Circuit In Miller v. Farrell Lines, 247 F. (2d) 503, Certiorari Denied 355 U.S. 912, 78 S.Ct. 342, And The Decision Of The Fifth Circuit In Barrios v. Waterman Steamship Corp., 290 F. (2d) 310.

The primary question involved in this case is the duty of search and rescue and the liability of a ship owner under the Jones Act, 46 United States Code, Section 688, when sued by the administratrix of a crew member, reported missing and allegedly lost while the ship is at sea. The question is of fundamental importance to seamen, shipowners and the maritime industry in general. Our research produces no opinion from this Court on the subject.

Miller v. *Farrell Lines*, 247 F. (2d) 503, a Jones Act case, was decided by the Second Circuit, August 16, 1957, in favor of the shipowner and this Court denied certiorari, 355 U.S. 912, 78 S.Ct. 342. Here a jury verdict in favor of the plaintiff was set aside by the District Court who entered judgment for the defendant. On appeal this judgment was affirmed by the Second Circuit.

Miller was a member of the crew of the Steamship "AFRICAN GLADE". While the ship was en route from New York to Dakar, West Africa, at around 11:30 P.M., November 14, 1950, Miller was seen pacing the after deck

and appeared deep in thought. This was the last time Miller was seen aboard the vessel. When he did not show up at the 10:00 A.M., coffee break November 15, the master was notified that Miller was missing. After an unsuccessful search of the vessel, the ship at 10:20 A.M., turned back on her previous course. During the search of the waters the master notified his home office and the United States Coast Guard Weather Ship by wireless. He did not wireless other ships in the vicinity, which the Court said was proper, because the Coast Guard had been in touch with them. When darkness fell at 6:16 P.M., the search was called off—70 miles short of where the ship was when Miller was last seen. The complaint alleged, among other things, that the defendant was negligent in failing to take adequate, proper and necessary steps to conduct a search for Miller after he went overboard. There was no evidence as to the time, manner or place of his departure from the ship. The theory was advanced that Miller jumped overboard intending to commit suicide. This, however, could have no bearing on the principles of law there involved. The Second Circuit, 247 F. (2d), at page 506, said:

> "In a suit under the Jones Act, it is necessary to show that the allegedly negligent act or omission of the defendant caused, in whole or in part, the damage for which recovery is sought. Rogers v. Missouri Pacific R. Co., 1957, 353 U.S. 500, 77 S.Ct. 443, 459, 1 L. Ed. 2d 493; Ferguson v. Moore-McCormack Lines, Inc., 1957, 352 U.S. 521, 77 S. Ct. 457, 459, 1 L. Ed. 2d 511. *The burden of showing this causation rests on the plaintiff.* Johnson v. New York, N. H. & H.R. Co., 2 Cir., 1952, 194 F. 2d 194, reversed on other grounds 344 U.S. 48, 73 S.Ct. 125, 97 L.

Ed. 77; Pittsburgh S. S. Co. v. Palo, 6 Cir. 1933, 64 F. 2d 198. In this case the plaintiff did not introduce evidence of any probative facts to show that the defendant's negligence played any part in Miller's loss of life. The jury was required to indulge in a series of speculations.

"Thus a series of speculations must all be indulged in and resolved in favor of the plaintiff in order to find any basis for saying that Miller could possibly have stayed afloat and alive long enough to be picked up. Each of these speculations must also reach a result which is contrary to the overwhelmingly probabilities. We do not see how the District Court could permit to stand such a jury finding in view of the fact that *the plaintiff has the burden of proof.* We do not believe that the Jones Act was meant to make ships the absolute insurers of the lives of their crew members who are lost at sea." Italics supplied.

The principle of law so clearly stated by the Second Circuit in *Miller* v. *Farrell Lines,* is that in Jones Act cases involving search and rescue, it is necessary to show:

(1) The alleged negligent act or omission of the defendant caused, in whole or in part, the damage sued for; and

(2) The burden of showing negligence, as well as causation, rests on the plaintiff.

Concluding that the plaintiff did not introduce evidence of probative facts sufficient to show that the defendant's alleged negligent acts played any part in Miller's loss of

life, the Second Circuit entered final judgment for the defendant, and this Court denied certiorari.

Barrios v. *Waterman Steamship Corp.*, 290 F. (2d) 310, a Jones Act case, was decided by the Fifth Circuit, May 26, 1961, in favor of the shipowner, affirming the District Court.

Barrios was a member of the crew of the Steamship "TOPA TOPA". On December 18, 1957, after the ship left Yokohama and put to sea, Barrios had the bow watch from midnight to 4:00 A. M. He was relieved temporarily for a coffee break by another seaman, returning to his post and reassuming his watch at 2:55 A.M. Some forty minutes later (3:35 A.M.) another seaman (Farnham) went to the bow to afford Barrios an additional respite, and found the bow unattended. Thinking that Barrios had left his post momentarily, Farnham assumed the watch until he was relieved at 4:00 A.M. Farnham did not notify the bridge of Barrios' absence from his post either at 3:35 or at 4:00, thinking to protect him from possible disciplinary action. Hence the master did not learn of Barrios' disappearance until 8:35 a.m. A search of the vessel was instituted, and when Barrios could not be located thereon, radio messages were dispatched to the Japanese Safety Agency, and to vessels in the vicinity. The "TOPA TOPA" at that time (8:35 a.m.) was encountering heavy weather, and did not return to search for the missing seaman. However, heavy weather did not arise until 6:49 a.m. as noted in the appeal briefs for the parties and therefore did not exist at 3:35 a.m., when seaman Farnham took over Barrios' duties as bow lookout and failed to report his absence. The Court at page 311, not mentioning heavy weather, said:

"* * *. Somewhat better founded, we think, is the argument that the seaman Farnham, on finding the bow unattended at 3:35 was remiss in his duty in failing promptly to notify the captain. Despite the fact that Farnham's failure was motivated by a desire to protect Barrios from possible disciplinary action, prudence and seamanship would have required affirmative action on his part."

In dealing with the question of causation involving search and rescue, the Fifth Circuit after commenting on the possible negligence of seaman Farnham in failing to report Barrios' absence on finding the bow unattended at 3:35 again at page 311, said:

"* * *. *If it be conceded, arguendo, that this was a negligent act of which the plaintiff might take advantage (negligence of a fellow servant), nevertheless there is a complete want of any evidence tending to show that Barrios was alive at that time, or that he might have been rescued.* The fact that he, of necessity, must have suffered a fall from the deck to the water's edge of some 35 to 40 feet; the probability of his being struck by the side of the vessel or by her propellers; the uncertainty as to the time at which he fell; and the darkness and fog, all point to a contrary conclusion. * * *.

The judgment of the Trial Court was correct, and is affirmed." Italics supplied.

It is obvious that here the Fifth Circuit, like the Second Circuit in the *Miller* case, supra, placed upon the plaintiff the burden of showing not only that the defendants were

negligent but that such negligence contributed in whole or in part to the death of plaintiffs' decedent. Because the plaintiffs did not meet this burden judgments were rendered for the defendants.

In the *Gardner* case, the findings of the District Court that the burden of proof as to both negligence and causation was on the plaintiff, were in accord with those approved by the Second Circuit in the *Miller* case, certiorari denied, and those approved by the Fifth Circuit in the *Barrios* case. The findings and conclusions of the Fourth Circuit are in direct conflict.

Instead of agreeing with the Second Circuit and the Fifth Circuit that in Jones Act cases, involving the duty of search and rescue, the burden of proving negligence and causation is on the plaintiff or the libellant, as the case may be, and that there is no liability on the defendant unless the plaintiff has shown to the satisfaction of the trier of the facts that had the master turned back and attempted a search, there would have been a reasonable possibility of rescue, the Fourth Circuit in its amended majority opinion has placed this burden on the "Bulkcrude". It held that the master's failure to conduct a search, despite the overpowering evidence that such search held no reasonable possibility of rescue, imposes liability upon the ship.

The Fourth Circuit in note 3 of its amended majority opinion beginning at page 22 of the appendix to this petition makes this significant statement:

> "We are mindful of other Circuit Court decisions excusing the master's failure to search the waters.

> See Miller v. Farrell Lines, 247 F.2d 503 (2d Cir. 1957). That case, however, was tried on the theory that the seaman had committed suicide, and the court declined to presume in such circumstances that he changed his mind and could have been saved by a reasonable search. See also, Barrios v. Waterman S.S. Corp., 290 F.2d 310 (5th Cir. 1961). * * *."

The above statement by the majority of the Court is an obvious admission by the Fourth Circuit that its decision is in direct conflict with the decisions of other Circuits on the basic question involved in this case.

After making the above statement in the note to its opinion, the Fourth Circuit beginning on page 6 of its opinion, appendix page 23 this petition says:

> "* * *. *Unless a search was made by that or other vessels in the area, it could not be determined that Gardner was beyond rescue.* * * *
>
> * * *. Failure to reverse her course and conduct a search, the argument runs, does not of itself account for the death, since it has not been definitely shown that the man was alive and could have been saved. But this view ignores the underlying character of the duty. It was less than a duty to rescue him, but it was a *positive duty to make a sincere attempt at rescue.* The duty (search) is of such nature that its omission will contribute to cause the seaman's death. The duty arises when there is a reasonable possibility of rescue. Proximate cause is tested by the same standard, i.e., causation is proved if the master's omission destroys the reasonable possibility of rescue.

> Harris v. Pennsylvania R.R. 50 F. 2d 866, 869 (4th Cir. 1931). Therefore, proximate cause here is implicit in the breach of duty (failure to search). * * *. Once the evidence sustains the reasonable possibility of rescue, ample or narrow, according to the circumstances, total disregard of the duty (search), refusal to make even a try, as was the case here, imposes liability.
>
> * * *
>
> *We hold that the burden of the risk involved in the master's inaction must be cast by the law on him and the ship*, and not on the helpless man in the water. * * *. *A master who abandons a missing seaman while there is yet a reasonable opportunity to save him, acts at his own risk.*" (Italics supplied.)

The basis of the Fourth Circuit's decision in the instant case is that a search is mandatory in all instances. In conflict with the decisions of the Second and Fifth Circuits, the decision of the Fourth Circuit in the *Gardner* case holds that despite the lack of any probative evidence that the man was alive and could have been rescued, the alleged negligent failure of the master of the "Bulkcrude" to search contributed to the seaman's death. The Fourth Circuit disregarding practically uncontradicted evidence that there was no reasonable possibility of rescuing Gardner had the Master of the "BULKCRUDE" turned back on the night in question and conducted a search, and disregarding the findings of the Trial Court to the same effect, holds that the Master was negligent in failing to make a try, and that such negligence proximately contributed to Gardner's death, for which the owner of the "BULKCRUDE" must respond in damages. As we have heretofore shown, the amended majority opinion of the Fourth Circuit says:

> * * *. Unless a search was made by that or other vessels in the area, it could not be determined that Gardner was beyond rescue. * * *. We hold only that refusal to make any effort (search) whatever cannot be justified."

We submit that the Fourth Circuit could not have used clearer or stronger language to support its finding that irrespective of the evidence or the findings of the District Court that there was no reasonable possibility of rescue, the Master's failure to turn back and make a search is in itself not only negligence but such negligence as "will contribute to cause the seaman's death", that is, both negligence and causation. Statements in the Fourth Circuit's opinion that the evidence must sustain the reasonable possibility of rescue before the Master's failure to turn back and search will constitute negligence, are completely inconsistent with its language hereinabove quoted. Such statements are likewise inconsistent with the Circuit Court's action in reversing on the minority evidence of one witness for libellant. Nor do they wipe out the findings of the Fourth Circuit that there is a duty on the Master to turn back in all such cases "in order to constitute a good faith performance of the ship's obligation". (See appendix this petition page 23).

If it be argued that the statement in the opinion of the Fourth Circuit that there was evidence to sustain the reasonable possibility of rescue, justifies its reversal of the judgment entered by the District Court and does not bring its decision in conflict with the Second and Fifth Circuits, the answer to this contention is that such a finding is contrary to the weight of the evidence, is contrary to the findings of the District Court and as explained in the dis-

senting opinion of Circuit Judge Haynsworth, is contrary to the decision of this Court in *McAllister* v. *United States*, heretofore discussed.

The Fourth Circuit in the *Gardner* case has established a completely new rule of law nowhere before enunciated in negligence actions arising under the Jones Act or F.E.L.A. It has removed the burden of proof from the shoulders of the libellant in this case and placed it upon the respondents. This doctrine for the *first* time forces the defendant in a negligence action under the Jones Act to exonerate itself. Its effect is that in a case where a seaman disappears under unknown circumstances, the burden to show the man was not alive and could not be rescued, is shifted to the defendant. Such action by the Fourth Circuit is directly contra to the language of the Second Circuit in *Miller* v. *Farrell Lines*, where at the bottom of page 506, it said:

> "* * *. We do not see how the District Court could permit to stand such a jury finding in view of the fact that the *plaintiff has the burden of proof*. We do not believe that the Jones Act was meant to make ships the absolute insurers of the lives of their crew members who are lost at sea." Italics supplied

The decision of the Fourth Circuit in the Gardner case does exactly what the Second Circuit in the *Miller* case says was not meant to be the law, that is, it makes ships and their owners the absolute insurers of the lives of men who are lost at sea unless the ship owner shows that rescue was impossible. In the *Gardner* case, as well as in the *Miller* case and the *Barrios* case, there was no evidence of any fault of the ship contributing to the man going overboard if indeed he did. It is common knowledge that in the ordin-

ary course of their duties and in weather that is not rough, seamen seldom fall overboard. Usually the more likely explanation is that the man jumps overboard for one reason or another. As pointed out in Judge Haynsworth's dissenting opinion, Gardner was contemplating hospitalization and on the next day foot prints were observed on a beam immediately beneath the port in the head just aft of the forecastle in which Gardner was quartered.

In the *Gardner* case the Fourth Circuit has shifted the burden of proof as to both negligence and proximate cause from the plaintiff to the defendant. The Court in its decision states:

> "* * *. Unless a search was made by that or other vessels in the area, it could not be determined that Gardner was beyond rescue."

This statement means that in all such cases the master of the ship must turn back and make a search of the waters despite, among other things the number of hours between the time the man was last seen and the time he is discovered missing. Otherwise, the plaintiff prevails merely by showing that the master did not turn back and conduct a search. The Fourth Circuit's majority opinion must be carefully considered in order to realize its effect on the burden of proof as to negligence in such cases.

The Fourth Circuit states in the opening paragraph of its opinion that the basis of the suit is the master's failure to make any attempt to rescue. We respectfully submit that the real question involved in this case is whether on the facts as established by the record there was any reasonable possibility of rescuing Gardner had a search been at-

temped. If the test to be applied is reasonable possibility of rescue then surely the record in this case does not support it. If the test to be applied is that a search must be attempted in every case, as the decision of the Fourth Circuit in effect holds, we again respectfully submit such is in direct conflict with not only the Second and Fifth Circuits but the *Harris Case* of the Fourth Circuit as well.

In *Miller* v. *Farrell Lines* and *Barrios* v. *Waterman Steamship Corp.*, the Court of Appeals dismissed the libels because under the Jones Act, the burden of proof being on the plaintiff, the plaintiff had failed to prove that the man in the water was still alive and might be rescued. The Fourth Circuit's decision has completely shifted from the plaintiff to the defendant the burden of proof. The decision forces the defendant to prove that the man in the water, through no fault of the ship, is not alive and could not be rescued. Such a shift in the burden of proof is in direct conflict with *Miller* v. *Farrell Lines*, *Barrios* v. *Waterman Steamship Corp.*, and all prior decisions under the Jones Act.

We respectfully urge this Court to consider the far reaching effect of the decision of the Fourth Circuit in the *Gardner* case, which, we submit, is in direct conflict with other circuits.

This Court, as we have said earlier, has never passed on the question of Search and Rescue and with the conflict that now exists between the Circuits, we respectfully submit that the conflict should at this time be resolved by this Court. The question of what duty is owed and the extent thereof in such cases is a question that affects shipping and seamen the nation over. Until the existing conflict is resolved, the law to be applied will remain a

nebulous concept, peculiar to the Court of Appeals hearing the case.

CONCLUSION

As the decision of the Fourth Circuit completely ignores the decision of this Court in *McAllister* v. *United States*, supra, and also is in direct conflict with the decision of the Second Circuit in *Miller* v. *Farrell Lines*, and with the decision of the Fifth Circuit in *Barrios* v. *Waterman Steamship Corp.*, and for other reasons herein set forth, petitioners respectfully request that a Writ of Certiorari should be granted.

Respectfully submitted,

NATIONAL BULK CARRIERS, INC., Et. Al., Petitioner

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APPENDIX

MEMORANDUM OF COURT, FILED DECEMBER 29, 1960

In this action under the Jones Act, 46 U. S. C. A. §688, libellant seeks a recovery for the death of her husband, a member of the crew of the SS BULKCRUDE, on December 8, 1958, while the vessel was southbound off the Florida Keys enroute from New York to Corpus Christi, Texas.

On the morning of December 8, the decedent, Gardner, complained to the master that he felt "shaky", whereupon he was given some medicine. He was also relieved from his 1200 to 1600 watch. Later the master instructed the chief mate to provide a relief for Gardner's 2400 to 0400 watch, but Gardner indicated that he intended to stand this watch. He was last seen at approximately 1830 on December 8 when he returned to his quarters. At 2340 a seaman went to Gardner's quarters to call him for his midnight watch. As he could not be located, this fact was reported to the master who immediately ordered a thorough search of the vessel, including an interrogation of most of the crew members to ascertain when Gardner had last been seen. The search of the vessel was completed around 0100 on December 9. Respondent contends that libellant has failed to establish the death, citing *Mutual Life Ins. Co. of New York* v. *Zimmerman*, 5 Cir., 75 F. (2d) 758, but the facts in that case are so clearly distinguishable that no comment is required. In the present controversy we have a crew member last seen at 6:30 P. M. while the vessel was off the Florida Keys; when reported missing at 11:40 P. M., a thorough search of the vessel was con-

ducted; the vessel did not dock for several days thereafter, and Gardner was not thereafter seen either dead or alive. The inescapable conclusion is that Gardner went overboard at some hour between 6:30 P. M. and 11:40 P. M. on December 8, 1958. Whether he met his death by drowning, by becoming involved with the ship's propeller, or by falling victim to a shark, barracuda, or other marine life, is immaterial.

From the time Gardner was last seen alive until the completion of the search around 0100 on December 9, approximately 6½ hours had elapsed. The vessel had, in the interim, traversed a distance of approximately 104 miles in smooth seas, on a dark night with no moon, with water temperature of 80 degrees, and under varying current conditions more adequately revealed by the testimony. At 0040 (12:40 A. M.) on December 9, the master sent a message to the Coast Guard at Miami reading as follows:

> "Seaman Robert E. Gardner missing from the SS Bulkcrude KXBM last seen about 1800 vicinity Tennessee Reef 24-42 North 80-44 West Stop First missed at 2330 when called for watch. All searches have been to no avail. Please advise."

In response, the Coast Guard advised that it would issue an "all ship's broadcast" and, at 0120 it sent an emergency message, followed by two hourly broadcasts through its marine operator, stating:

> "All shipping straits of Florida SS Bulkcrude advises seaman missing X Last seen on board about 2300Z vicinity Tennessee Reef 24-42 N. 80-44 W. X Keep sharp lookout possible man overboard."

Libellant urges that the vessel's master at no time requested the Coast Guard to take any affirmative action to search for Gardner. The answer lies in the testimony of the Chief of Search and Rescue Section who states that the Coast Guard places no importance on the difference between a request for search and a mere notification; that each situation is evaluated separately to determine whether a search will be conducted and, in any event, any search would not be carried on at nighttime as the chances of locating a man in the water in darkness are very poor unless the man is equipped with a flare or its equivalent. Indeed, this witness described the chances of finding a man overboard at night as "almost impossible".

Much of the evidence relates to the various points passed by the vessel off the Florida Keys. In some instances the current was away from the Keys; in others the current was set in toward the shore line or Keys. Suffice it to say, there was no set pattern followed by the vessel. A course made good did not mean a course actually traversed. Of course, an object, such as a human being, entering the water will flow with the current. In short, the master—when faced with the realization that Gardner was overboard—was confronted with a variety of questions in making his decision not to reverse his course and search for the missing crewman. Among these problems are:

(1) The unknown time when Gardner apparently jumped overboard.

(2) The approximate place that such action took place.

(3) The distance traversed and elapsed time since Gardner was last seen.

(4) Whether the seaman avoided the propeller after hitting the water.

(5) Whether Gardner hit the water in such a manner as to remain afloat.

(6) Whether, assuming an intent to commit suicide, Gardner changed his mind after striking the water and endeavored to remain afloat.

(7) Whether he could and, with some reasonable possibility, would remain afloat long enough for the vessel to reach him.

(8) The darkness of the night.

(9) The danger of shark, barracuda, and other marine life.

(10) The danger incident to following a reciprocal course in returning to the Tennessee Reef area.

The Court discounts respondents' contention that any appreciable danger would be encountered by the vessel in reversing its course, thus requiring it to follow a path of travel customarily reserved for southbound ships. With the weather clear and seas smooth, the normal rules of navigation would not present any obstacle of note when contrasted with the duty imposed by law to conduct a search for the missing seaman, if such a search has any reasonable possibility of success.

As to the remaining problems confronting the master, the Court is in complete agreement with the masters' conclusion that there was no reasonable possibility or probability of locating Gardner. It is argued that the vessel should have retraced its course for at least a short distance and a few hours. But it is a reasonable inference from the

testimony that since Gardner was last seen around 6:30 P. M., his disappearance from the vessel more than likely occurred shortly thereafter, as other crewmen would have probably seen him around the vessel. A proper search under such circumstances, if required, would have entailed a return to the Tennessee Reef area, probably at a lesser speed to enable a proper lookout to be maintained in the interim. As the ship was off Rebecca Shoal Lighthouse around 1 A. M. on December 9, when it was substantially determined that Gardner was overboard, and as 6½ hours had elapsed, it means that the BULKCRUDE would probably not have reached the Tennessee Reef area until some appreciable time after 8 A. M. Conceding, for the purpose of argument, that a good swimmer may survive indefinitely in water temperature of 80 degrees, it does not follow that any reasonable possibility of locating Gardner existed under the facts of this case.

This Court has previously held in *Tate* v. *C. G. Willis, Inc.*, 145 F. Supp. 402, that there must be some causal relation between the alleged breach of legal obligation on the part of the shipowner and the loss of life. Some reasonable inference of probable success in saving the life of the seaman must exist. In *Tate*, the seaman fell into the Delaware River when attempting to board a tug from the dock. The only affirmative effort to rescue was to continuously play flashlights over the area where Tate entered the water which, admittedly, was in a confined area. While the facts of no two cases perhaps are identical, and while each case must rest upon the peculiar factual situation existing, the principles of law in *Tate* are believed to correctly state the rule in this circuit. Such is the reasoning in *Harris* v. *Pennsylvania R. Co.*, 4 Cir., 50 F. (2d) 866, 868, where Judge Soper said:

> "But we have no doubt that a legal obligation rests upon a ship to use due diligence to save one of the crew, who, by his own neglect, falls into the sea; and that the owners are liable *if, by failing to perform this duty, his life is lost.*"

See, also, *Sadler* v. *Pennsylvania R. Co.*, 4 Cir., 159 F. (2d) 784.

Libellant, while not agreeing with the principles set forth in *Tate,* advances the novel theory that the question of causal connection is not applicable unless there has been some effort on the part of the ship to conduct a search. Stated otherwise, libellant argues that since there is an absolute duty under all circumstances to conduct a search for a crewman discovered to be overboard, the shipowner who fails to make any search is automatically negligent as a matter of law is barred from advancing the defense of lack of possible or probable success in locating the seaman. Admittedly, in the present case, the master of the vessel did nothing by way of search for the missing man overboard other than to notify the Coast Guard. To accept libellant's premise it would, under any and all circumstances, be incumbent upon the ship to retrace its course and conduct a search, irrespective of the number of hours elapsed or miles traversed. We do not believe that the law is subject to such a strict interpretation. The issue of causation has been repeatedly held to be a factor for consideration by the trier of fact in "failure to rescue" cases. *New York Central R. Co.* v. *Grimstead,* 2 Cir., 264 Fed. 334; *Hutchinson* v. *Dickie,* 6 Cir., 162 F. (2d) 103; *Johnson* v. *New York, N. H. & H. R. Co.*, 2 Cir., 194 F. (2d) 194; *Petition of Trans-Pacific Fishing & Packing Co.* (*The Western Clipper*), D. C. Wash., 152 F. Supp.

44; *Miller* v. *Farrell Lines*, 2 Cir., 247 F. (2d) 503, cert. den. 355 U. S. 912. The latter case, decided under the Jones Act subsequent to the decision of the Supreme Court in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, held that the burden of showing causation rested upon the plaintiff, even though the negligence need only be shown to be *in whole or in part* that of the officers, agents or employees. The syllogism advanced in *Miller* is closely analogous to the views of this Court on the question of causation, although it must be noted that the vessel in *Miller* did attempt a search after a lapse of nearly 11 hours following the time Miller was last seen. There is nothing in the opinion of Circuit Judge Lumbard to indicate that the vessel was, or was not, under a duty to conduct this search.

We are told that the requirement of search is a contractual obligation and, therefore, the possibilities or probabilities of success only touch upon the sufficiency of the performance of the contractual duty to search and rescue. That it is a part of the implied contract with all seamen to use all *reasonable* means to save the life cannot be doubted. However, this action is instituted under the Jones Act which requires proof of negligence. That there may be an alleged breach of a contractual duty does not foreclose the right of recovery in tort, as will be seen from *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, where Mr. Justice Cardozo said:

> "We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more . The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties.

> For breach of a duty thus imposed, the remedy upon the contract does not exclude an alternative remedy built upon tort. . . . . If the wrong is of such a nature as to bring it by fair intendment within the category of a 'personal injury' that has been caused by the 'negligence' of the master, it is not beyond the statute because it may appropriately be placed in another category also."

The Supreme Court, in reversing the Court of Appeals for the Second Circuit in *Cortes*, apparently recognized that, even where the negligence grows out of an alleged breach of contractual duty, there must, nevertheless, be a causal relation between the negligence and the death. 287 U. S., at page 378. Thus, it is apparent that the elementary principles of negligence (as required by the Jones Act) and causation must be established.

While not mentioned in the brief, and now apparently abandoned, the contention was once submitted that the provisions of 46 U. S. C. A. §728 made it mandatory upon the master to conduct the search. The statute does impose an obligation upon any master to assist "every person who is found at sea in danger of being lost", providing assistance can be rendered without serious danger to his own vessel, crew, or passengers. The statute imposes a criminal penalty against the master. To impute civil liability upon the owner for the alleged criminal act of the master is contrary to *Warshauer* v. *Lloyd Sabaudo S. A.*, 2 Cir., 71 F. (2d) 146. The point does not merit further discussion.

Holding that, under the peculiar facts of this case, the master of the BULKCRUDE was not negligent in failing to reverse his course for the purpose of conducting a

search, and that, in any event, there was no reasonable possibility of success and, hence, there was no causal relation between the negligence, if any, and the death, a decree will be entered dismissing the libel.

The Court, pursuant to General Admiralty Rule 46½, adopts this memorandum in lieu of any specific findings of fact and conclusions of law.

FIRST OPINION

SOBELOFF, Chief Judge:

Failure of the master of a vessel to make any attempt to rescue a member of his crew lost at sea is the basis of the present suit, brought under the Jones Act, 46 U.S.C.A. § 688, by the seaman's widow and executrix against the vessel and her owner.

The S.S. Bulkcrude was en route from New York to Corpus Christi along the Florida Keys at 11:30 p.m. on December 8, 1958, when seaman Robert Gardner was called to stand watch. He could not be found, and the master ordered a search of the vessel. The search, which lasted an hour or more, proved unsuccessful. Inquiry disclosed that Gardner was last seen about 6:00 p.m. that evening. At 12:30 a.m., December 9, the Coast Guard was notified by wireless, and it responded with an "All Ships' Broadcast," but the master took no further steps to find the missing seaman. Indeed, he did not alter the speed

or course of the Bulkcrude either during or after the search. At 6:00 a.m., he reported Gardner's disappearance to the owner in New York and asked for instructions. The owner's answer was, "Action must be decided by you as master." No action was taken, and the vessel, which had maintained her course and speed through the night, continued on to Corpus Christi. These facts are not in controversy.

In addition, there was general agreement among the expert witnesses who testified at the trial that, under the environmental conditions existing that night, a man in the water might have survived and been saved by a reasonable search. The experts differed, however, in regard to the lapse of time and distance within which a rescue operation had hope of success. On the one hand, libellant's witness testified that a reasonable search over the entire course traveled by the Bulkcrude between 6:00 p.m., when Gardner was last seen, and 11:30 p.m., when he was reported missing, would probably have succeeded; while the respondents' experts expressed the opinion that an attempted rescue operation could hold hope of success only if Gardner had in fact gone overboard shortly before 11:30 p. m., when he was reported missing. Obviously these judgments are not conflicting in their entirety—they agree that there was some range of time and distance in which rescue would have been possible if attempted. They agree at least that if the man entered the water not long before 11:30 p.m. and that fact had been known, then a search would have been indicated for it would have had a reasonable expectation of success.

The District Court presumed that Gardner went overboard soon after he was last seen at 6:00 p.m., rather than at some later point of time, and adopted the testimony of

the respondents' experts as to the time and area within which an effective effort might have been made. On this basis the court arrived at the conclusion that, as Gardner was beyond rescuable limits, the master's failure to make the attempt had no causal connection with the seaman's death. Judgment was entered for the respondents. 190 F. Supp. 143 (E.D. Va. 1960).

The survival of a seaman adrift at sea depends in large measure upon the diligence of those who are required by law to look for him. If they default in their duty, death is made certain. In recognition of this unyielding truth the admiralty law annexes to a seaman's contract of employment an obligation on the part of the master to use every reasonable means to save the seaman's life if he goes overboard. *Harris* v. *Pennsylvania R.R.*, 50 F. 2d 866 (4th Cir. 1931). In the cited case, after discussing the established obligation of the vessel to provide medical care and attendance to an injured seaman, Judge Soper for our court concluded: "Equally clear is the obligation upon the part of the ship to save the life of a sailor who falls overboard through a misadventure, not uncommon in his dangerous calling. It is absurd to admit the duty to extend aid in the lesser emergency, and to deny it in the greater. In both cases, it is implied in the contract that the ship shall use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea demands as much wherever human life is in danger. The seaman's contract of employment requires it as a matter of right." *Id.* at 868-69.

This humanitarian rule, known as the rescue doctrine, has been approved by the Supreme Court, *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, 377 (1932), and followed in other circuits. See *Johnson* v. *United States*, 74 F.2d

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The instant case presents no unheard of situation. Not infrequently, a seaman disappears from his vessel under unknown circumstances, and before he is reported missing several hours have elapsed since he was last seen. It can indeed be speculated, as the respondents suggest, that the seaman slipped, fainted or otherwise involuntarily went overboard, or that he entered the water bent on self-destruction. Likewise, it is conceivable that he was killed in the fall, cut to pieces by the propeller or drowned immediately; also, there may be speculation as to the precise point in time when these events occurred. But only one thing is known with certainty: often seaman who fall overboard survive for many hours in the water.[2]

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[1] A number of district court cases have applied the doctrine. *United States* v. *Knowles*, 26 Fed. Cas. 800 (No. 15,540) (D.C. N.D. Cal. 1864); *Salla* v. *Hellman*, 7 F.2d 953 (S.D. Cal. 1925); *The G. W. Glenn*, 4 F. Supp. 727 (D. Del. 1933); *Tompkins* v. *Pilots Ass'n for Bay and River Delaware*, 32 F. Supp. 439 (E.D. Pa. 1940); *Ferro* v. *United States Lines Co.* 74 F. Supp 250 (S.D. N.Y. 1947); *Petition of Trans-Pacific Fishing & Packing Co.*, 152 F. Supp. 44 (W.D. Wash. 1957); *Tate v. C. G. Willis, Inc.*, 154 F. Supp. 402 (E.D. Va. 1957); *Tweedy* v. *Esso Standard Oil Co.*, 190 F. Supp. 437 (S.D. N.Y. 1960).

[2] At trial, libellant tendered proof of the high proportion of successful sea rescues conducted by the Allies during World War II. This revealed a large number of successes following as much as twenty-four hours in the water. Perhaps, however, the most striking example of a man's ability to survive is found in *Petition of Trans-Pacific Fishing & Packing Co.*, 152 F. Supp. 44 (W.D. Wash. 1957). There a seaman was saved after he "swam, drifted and treaded water for about 56 hours after he was swept overboard." Id. at 46.

The decisive question is, what was the master's duty in the present circumstances? The court found as a fact that turning back would have entailed no risk. The only thing that would have been lost in attempting rescue was time; the Bulkcrude might have reached its distination a half day late, at the most.

The master's dereliction in failing to search the wafers was aggravated by other conduct. For example, his wireless message to the Coast Guard advising it of the seaman's plight was uninformative. It stated: "SEAMAN ROBERT E. GARDNER MISSING FROM THE SS BULKCRUDE KXBM LAST SEEN ABOUT 1800 VICINITY TENNESSEE REEF 24.42N 80.44W STOP FIRST MISSED AT 2330 WHEN CALLED FOR WATCH ALL SEARCHES HAVE BEEN TO NO AVAIL PLEASE ADVISE."

Omitted was the vital information concerning speed and course of the vessel since the seaman was last seen.

Further, the master could have acted to notify other ships he knew to be in the area, but he neglected to do so. Although the night was dark and the tides irregular, the waters were warm (80°) and calm, there was little or no wind, and there was a reasonable possibility that other vessels, correctly advised, might have found him. The master was content to leave this to the Coast Guard and then sat idly by as it sent the following message: "ALL SHIPPING STRAITS OF FLORIDA SS BULKCRUDE ADVISES SEAMAN MISSING X LAST SEEN ON BOARD ABOUT 082300Z [8th December at 11:00 p.m.] VICINITY TENNESSEE REEF 24-42N80-44W X KEEP SHARP LOOKOUT POSSIBLE MAN OVERBOARD." The message erroneously

states that the seaman was last seen at 11:00 p.m., and this misinformation could well have caused the other ships unwarrantedly to limit their search to a small area around Tennessee Reef and to miscalculate the drift of the seaman while in the water. The master did nothing to make a correction or to give more specific information.

Taken in combination, the master's conduct, both of commission and omission, shows an inexcusable disregard of his serious responsibility to a crewman. We hold that under the facts here the master did not do all that was required of him.[3]

The District Court, as we have noted, arrived at its conclusion exonerating the respondents by accepting their unsupported and unwarranted deduction that, because Gardner was last seen at 6:00 p.m., he must have gone overboard shortly thereafter and was surely beyond reach at 11:30 p.m. We think the court was in error in its basic premise that Gardner went overboard soon after he was last seen. In truth, no one could really know with any degree of certainty whether the fatal plunge occurred five minutes after he was last seen, or five minutes before he was reported missing, or at what intervening moment.

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[3] We are mindful of other circuit court decisions excusing the master's failure to search the waters. See *Miller* v. *Farrell Lines*, 247 F.2d 503 (2d Cir. 1957). That case, however, was tried on the theory that the seaman had committed suicide, and the court declined to presume in such circumstances that he changed his mind and could have been saved by a reasonable search. See also, *Barrios* v. *Waterman SS. Corp.*, 290 F.2d 310 (5th Cir. 1961). On the other hand, in *Salla* v. *Hellman*, 7 F.2d 953 (S.D. Cal. 1925), a master's failure to attempt rescue of a seaman who fell overboard during a storm established liability, even though there was no affirmative showing that an attempt would have succeeded. See also, *Kirincich* v. *Standard Dredging Co.*, 112 F.2d 163 (3d Cir. 1940).

Unless a search was made by that or other vessels in the area, it could not be determined that Gardner was beyond rescue. This is the classic situation which in reason and humanity called for the exertion of every reasonable effort to ascertain his whereabouts. We need not define how far or how extensive a search was called for in order to constitute a good faith performance of the ship's obligation. We hold only that refusal to make any effort whatever cannot be justified.

Proximate cause, the ship urges, has not been proved. Failure to reverse her course or accurately inform other vessels, the argument runs, does not of itself account for the death, since it has not been definitely shown that the man was alive and could have been saved. But this view ignores the underlying character of the duty. It was less than a duty to rescue him, but it was a positive duty to make a sincere attempt at rescue. The duty is of such nature that its omission will contribute to cause the seaman's death. The duty arises when there is a reasonable possibility of rescue. Proximate cause is tested by the same standard, i.e., causation is proved if the master's omission destroys the reasonable possibility of rescue. *Harris* v. *Pennsylvania R.R.*, 50 F.2d 866, 869 (4th Cir. 1931). Therefore, proximate cause here is implicit in the breach of duty. Indeed, the duty would be empty if it did not itself embrace the loss as a consequence of its breach. Once the evidence sustains the reasonable possibility of rescue, ample or narrow, according to the circumstances, total disregard of the duty, refusal to make even a try, as was the case here, imposes liability.

Moreover, the master's default—virtually complete—is emphasized by another consequence flowing therefrom. It

obliterated all possibility of evidence to prove whether a search or a watch by other vessels, if undertaken, would have succeeded or failed. This alone has in analogous situations been considered a sufficient ground to fasten responsibility on the wrongdoer.[4] However, we do not rest our decision on this principle.

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[4] In a negligence case the Supreme Court of Canada has said:

"What, then, the culpable actor has done by his initial negligent act is, first, to have set in motion a dangerous force which embraces the injured person within the scope of its probable mischief; and next, in conjunction with circumstances which he must be held to contemplate, to have made more difficult if not impossible the means of proving the possible damaging results of his own act or the similar results of the act of another. He has violated not only the victim's substantive right to security, but he has also culpably impaired the latter's remedial right of establishing liability. By confusing his act with environmental conditions, he has, in effect, destroyed the victim's power of proof.

"The legal consequence of that is, I should say, that the onus is then shifted to the wrongdoer to exculpate himself; * * *." *Cook* v. *Lewis*, [1951] Can. Sup. Ct. 830, 823-33, [1952] 1 Dom. L. Rep. 1, 3-4 (1951).

This quote is from the concurring opinion by Judge Rand, but it is in line with the expressed view of Judge Cartwright writing for the majority. [1951] Can. Sup. Ct. at 842-43, [1952] 1 Dom. L. Rep. at 18.

To the same effect is *Landers* v. *East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W. 2d 731 (1952). There two actors had done independent acts resulting in the pollution of a stream, and the court relieved the plaintiff of his burden of proving the extent to which the defendant and other causes, respectively, contributed to the injury. The court applied the principle that where a wrongdoer has united his tortious conduct with other causes resulting in injury to another, justice dicates that he may not take advantage of the fact that he has thereby prevented the injured person from demonstrating the defendant's share in the resulting injury. See also, *Summers* v. *Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948); *Meier* v. *Holt*, 347 Mich. 430, 436, 80 N.W. 2d 207, 213 (1956) (dissent); *Harris* v. *Cleveland*, 294 S.W.2d 235, 241 (Tex. Civ. App. 1956).

The respondents offer no acceptable explanation of the master's conduct. They seek to justify it by the argument that unavoidable passage of time and distance relieved him of the duty to do more than he did. They develop this defense as a conclusion from three premises: first they say that the master had no duty to stop the Bulkcrude while she was being searched to ascertain whether Gardner was still aboard; second, that since the vessel steamed on during the search for an hour and a half after Gardner was reported missing, all possibility of then conducting an effective search of the waters was thereby erased and third, that he was not obligated to amplify or correct his message to the Coast Guard, or correct their misunderstanding. The defense is unacceptable.

We do not imply that in every case immediately upon word of a seaman's absence from his watch all progress of the ship must be halted and the ship reversed for rescue operations while a search is made aboard for the seaman. It is realized that the master is called upon to make his decision on the basis of uncertain fact.

We hold that the burden of the risk involved in the master's inaction must be cast by the law on him and the ship, and not on the helpless man in the water. If the rescue doctrine is not to be utterly stultified, this must be the rule. The grave obligation of rescue is not to be satisfied

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Prosser describes the rule as requiring the defendant to "exonerate itself or pay." Prosser, Torts, 207-08, 230-31 (2d ed. 1955).

Analogously, there has long existed a rule of evidence that if a party intentionally or fraudulently destroys a written document with the intent to suppress evidence, its content is presumed to have been detrimental to him. Omnia praesummuntur contra spoliatorem. See *Berthold-Jennings Lumber Co.* v. *St Louis, I.M. & S. Ry.*, 80 F.2d 32, 41 (8th Cir. 1935).

merely by a search of the vessel. A master who abandons a missing seaman while there is yet a reasonable opportunity to save him, acts at his own risk.

In the circumstances of this case, the inaction of the master in the respects noted established a neglect of the duty of rescue—a neglect from which a contributing cause of the seaman's death is fairly and conclusively drawn by law.

Reversed and remanded for the determination of damages.

SECOND OPINION

[October 26, 1962]

SOBELOFF, Chief Judge.

Failure of the master of a vessel to make any attempt to rescue a member of his crew lost at sea is the basis of the present suit, brought under the Jones Act, 46 U.S.C.A. § 688, by the seaman's widow and executrix against the vessel and her owner.

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closed that Gardner was last seen about 6:00 p.m. that evening. At 12:30 a.m., December 9, the Coast Guard was notified by wireless, and it responded with an "All Ships' Broadcast," but the master took no further steps to find the missing seaman. Indeed, he did not alter the speed or course of the Bulkcrude either during or after the search. At 6:00 a.m., he reported Gardner's disappearance to the owner in New York and asked for instructions. The owner's answer was, "Action must be decided by you as master." No action was taken, and the vessel, which had maintained her course and speed through the night, continued on to Corpus Christi. These facts are not in controversy.

In addition, there was expert testimony at the trial that, under the environmental conditions existing that night, a man in the water might have survived and been saved by a reasonable search. The experts differed, however, in regard to the lapse of time and distance within which a rescue operation had hope of success. On the one hand, libellant's witness testified that a reasonable search over the entire course traveled by the Bulkcrude between 6:00 p.m., when Gardner was last seen, and 11:30 p.m., when he was reported missing, would probably have succeeded; while the respondents' experts expressed the opinion that an attempted rescue operation could hold hope of success only if Gardner had in fact gone overboard shortly before 11:30 p.m., when he was reported missing. Obviously these judgments are not conflicting in their entirety—they agree that there was some range of time and distance in which rescue would have been possible if attempted. They agree at least that if the man entered the water not long before 11:30 p.m. and that fact had been known, then a search would have been indicated for it would have had a reasonable expectation of success.

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The instant case presents no unheard of situation. Not infrequently, a seaman disappears from his vessel under unknown circumstances, and before he is reported missing several hours have elapsed since he was last seen. It can indeed be speculated, as the respondents suggest, that the seaman slipped, fainted or otherwise involuntarily went overboard, or that he entered the water bent on self-destruction. Likewise, it is conceivable that he was killed in the fall, cut to pieces by the propeller or drowned immediately; also, there may be speculation as to the precise point in time when these events occurred. But only one thing is known with certainty: often seaman who fall overboard survive for many hours in the water.[2]

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We hold that under the facts here the master did not do all that was required of him.[3]

The District Court, as we have noted, arrived at its conclusion exonerating the respondents by accepting their unsupported and unwarranted deduction that, because Gardner was last seen at 6:00 p.m., he must have gone overboard shortly thereafter and was surely beyond reach at 11:30 p.m. We think the court was in error in its basic premise that Gardner went overboard soon after he was last seen. In truth, no one could really know with any

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Moreover, the master's default—virtually complete—is emphasized by another consequence flowing therefrom. It obliterated all possibility of evidence to prove whether a search, if undertaken, would have succeeded or failed. This alone has in analogous situations been considered a sufficient ground to faster responsibility on the wrongdoer.[4] However, we do not rest our decision on this principle.

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Analogously, there has long existed a rule of evidence that if a party intentionally or fraudulently destroys a written document with the intent to suppress evidence, its content is presumed to have been detrimental to him. Omnia praesumnuntur contra spoliatorem. See *Berthold-Jennings Lumber Co.* v. *St Louis, I.M. & S. Ry.*, 80 F.2d 32, 41 (8th Cir. 1935).

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In the circumstances of this case, the inaction of the master established a neglect of the duty of rescue—a neglect from which a contributing cause of the seaman's death is fairly and conclusively drawn by law.

Reversed and remanded for the determination of damages.

HAYNSWORTH, Circuit Judge, dissenting:

I agree with the Court's statement of the governing legal principle that duty of search arises when there is a reasonable possibility of rescue. I agree also that if the duty is neglected and the seaman is lost, the burden ought not to be upon his representative to establish the fact that he was alive and would have been saved by a reasonable rescue effort. I respectfully disagree, however, with the Court's resolution of the factual issue, for the finding below that there was no reasonable possibility of rescue is amply supported by evidence. Since McAllister v. United States,[1] it is plain that this Court has no power to try the factual issues de novo, or to substitute its appraisal of the facts for that of the District Court when the District Court's findings are not clearly erroneous. We, of course, exceed our appellate powers when we consider findings made by the District Court in disregard of their evidentiary basis or without sufficient regard for the evidence upon which the findings were predicated.

Gardner had been ill. He had missed his preceding

watch on that account and was contemplating hospitalization. He was last seen at approximately 1800 in the evening going in the direction of his quarters. The next day footprints were observed on a beam immediately beneath the port in the head just aft of the forecastle in which Gardner was quartered.

At the time, in early December 1958, the Bulkcrude was southbound through the Florida Straits. She was off Tennessee Reef when Gardner was last seen. When Gardner was first missed, approximately five and one-half hours later, the ship had made good eighty-five miles, and, by the time the search of the ship was completed, the Bulkcrude was approximately one hundred and five miles from Tennessee Reef. The weather was clear and the sea calm, but the night was dark and moonless. There was testimony of great danger of one going over the side of a vessel being sucked into the propeller, particularly when the ship is in ballast and riding high as the Bulkcrude was. There was also testimony of danger to one who might avoid the hazard of the propeller from sharks and barracuda. Of even greater importance, there was abundant testimony that the currents over the Bulkcrude's track that night sometimes set in toward the Florida Keys, sometimes out from the Keys. This is readily apparent from the plot of the vessel's track, and all witnesses agreed that, to compute the drift of a floating body in the water, one would require knowledge of the place along the track at which the body entered the water. Without knowing where Gardner went overboard, there was no way to determine whether his drift would be inshore or offshore.

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[1] 348 U.S. 19, 75 S. Ct. 6, 99 L.Ed. 20.

Under these circumstances, several masters, testifying for the respondent, expressed the opinion that there was no reasonable possibility of rescue. Each of those witnesses testified that, under the circumstances, he would not have turned the ship about had he been in the position of the Bulkcrude's Master. Those witnesses, the Bulkcrude's Master and the Bulkcrude's Mate, all testified that, without more specific information than that Gardner went overboard at sometime between 1800 and 2330, there was no way to tell where to go to look for him, and that unless one knew within reasonable limits where to search, any search would be futile.[2] Moreover, one of the libelant's two witnesses, the Chief of the Search and Rescue Section of the Fifth Coast Guard District, testified that it was "almost impossible" to see a man in the water at night, unless the man in the water was equipped with flares or other special signaling equipment. He further testified that had he been on duty in Miami, he would not have launched a Coast Guard search that night, and if he launched one the next day, it would not have been very extensive because of the circumstances and the wide expanse of water to be covered.

The Coast Guard Chief Warrant Officer on duty in Miami, who received the Bulkcrude's message early on the morning of December 9, testified that he initiated no rescue effort because, in his opinion, rescue was impossible. He said there was such uncertainty as to the time and place where Gardner went overboard that any search that night or the next day was impractical. Even if he had

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[2] There is no doubt but that the Master, by questioning all members of the ship's company, did everything he could to obtain more definite information as to when and where Gardner went overboard.

known where Gardner went overboard, he would not have launched a Coast Guard search during the hours of darkness, but would have sent a plane after sunrise. Not knowing where to send the plane, however, none was sent. He did send a series of All Ships Broadcasts notifying other shipping in the Straits to be on the lookout for Gardner. Further steps he thought were futile and impractical, and no further steps were taken.

It is apparent that none of these witnesses assumed that Gardner went overboard soon after he was last seen at approximately 1800. Their difficulty arose out of the fact they had no basis for assuming when between 1800 and 2300 he went overboard, and it was on that account that they all agreed that the Master of the Bulkcrude had no basis for deciding where to look for Gardner. There was also general agreement among these witnesses that because of the cross currents and the darkness of the night, there was little or no point in the Bulkcrude reversing her course and proceeding back along her own track. Only one witness, one of the two offered by the libelant, was of the opinion that had the ship been turned on a reciprocal course there was a reasonable possibility that Gardner, if alive and "wiggling in the water," might have been sighted and rescued.

As noted by the majority, several of these witnesses indicated that they would have undertaken some search if they had known that Gardner went overboard shortly before he was missed, for, in that event, they could pinpoint the area of search. With that information, they could determine the ship's approximate location at the time he went overboard, they could compute Gardner's drift, and the ship could proceed to the place where Gardner could be

expected to be found, if, indeed, he had survived the other hazards and was still afloat and alive. There was no agreement among the witnesses, as the majority indicates, that without such information some search in a limited area and time should have been or would have been undertaken. On the contrary, all of the respondent's witnesses and one of the two witnesses for the libelant agreed that a search and rescue effort was hopeless under the circumstances which confronted the Bulkcrude's Master that night in the light of the darkness of the night and of the fact that he had no basis for a determination of a search area.

It is true that the District Judge at one point in his opinion said it was more likely that Gardner went overboard shortly after he was last seen at approximately 1800 than at some later time, but earlier in his opinion he recognized that the real problem confronting the Master was the absence of any basis for any rational assumption as to when and where Gardner went overboard. If fault might be found with that later speculation, it was not a general assumption that Gardner went overboard shortly after 1800, and it does not defeat the District Court's expressed recognition of the fact that the real and insolvable problem confronting the Master was the fact that nothing was known as to when, during the five and one-half hour period, and where, during the eighty-five miles of travel, Gardner went overboard. If, however, that speculation might be said to have infected the general findings of the District Court, this Court would not be justified in making its own findings in disregard of other specific findings of the District Court, particularly when the District Court's findings are not only clearly erroneous, but are supported by the great weight of the testimony.

I think we exceed the permissible bounds of appellate review when we disregard the abundant testimony supporting the finding that there was no reasonable possibility of rescue of Gardner, or we violate the substantive principle we profess to apply when we insist that there was a reasonable possibility or rescue in the face of the contrary finding below and the abundant evidence which supports it.

I think this case presents only a factual question which was foreclosed by the District Court's findings.

EXCERPTS FROM TESTIMONY

(tr. 229) * * *

EDWIN B. ING, called as a witness by and on behalf of the libellant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

Q. Well, Captain, what would be your practice if you received a message at approximately twenty minutes to one in the morning or 12:45 a.m. or 0040?

A. Again, I'm sorry, I have to ask for more information. I would still have to have further information as to the conditions—in other words, I believe you're talking about a man overboard—

Q. Yes.

A. —and as to whether or not he went overboard then, or he was discovered overboard then, and how long it had

been before he was last seen, and what he was doing, and so forth and so on. The chances of finding a man at night, if he went overboard, before he was seen to go overboard, without special survival equipment, might be very poor. We might not dispatch anything.

* * *

(tr. 244 * * *

BY THE COURT:

Q. You can see a man in the water better in the daytime than you can at night, can't you?

A. Certainly, yes, sir. As a matter of fact, this is—again, I think we are verging on opinion—I think it is almost impossible to see one at night unless he had signaling equipment, special flare equipment.

BY MR. KELSEY:

Q. You are speaking of seeing them from aircraft, are you not?

A. From anything.

(tr. 245) * * *

BY MR. KELSEY:

Q. Suppose you have searchlights on, not too impossible?

A. It would still be very difficult.

Q. Be very difficult?

A. Unless the individual had some signaling equipment—

* * *

(tr. 249) * * *

BY THE COURT:

Q. Captain, if the message you received— and this is assuming that you were at Miami—read substantially as follows—you received this message at approximately 1:00 a.m. in the morning—that a seaman was missing from a ship; that he had last been seen at approximately 6:00 p.m. the night before in a place that was then about 104 miles from the place where the ship was then located, but they gave you the location of the place where he was last seen while on board the vessel, what practice would you follow under such circumstances?

A. I don't think I would launch a search, Your Honor; however, in that case, we would have tried to notify all ships. However, this message that reported the missing man probably was—possibly was a safety or an emergency signal to all ships to keep a lookout in the vicinity. Under those conditions, if we did launch a search, I don't think it would have been at night. I think we probably, at least, would have waited until the morning.

* * *

(tr. 250) * * *

Q. (By Mr. Kelsey) You think you would start the search in the morning. You did say that?

MR. SYKES: He did not.

A. I say, if I started one, I probably would have waited until morning, but there are other circumstances that would have affected that, and that would have been the availability of aircraft—search and rescue aircraft—and the weather conditions at the time.

BY THE COURT:

Q. Assuming that the weather was what we would call "ideal," smooth sea and very little wind, and so on—

A. Yes, we would probably have launched a search, but not until morning. It might not have been a very intensive search because of the circumstances and, I'd say, low probability of finding a man without special equipment, however, over a rather wide expanse of water.

* * *

(tr. 253) * * *

Q. All right. Now, seeing the track of this vessel, as I have said, between Alligator Reef and Dry Tortugas south of the Keys, in the daytime or at the first light in the morning, tell us what difficulties, if any, would be involved in the search of this track approximately 104 miles long that you could, at the present time, see?

A. The difficulties would involve primarily the ability to detect the person in the water without the necessary—without extra equipment.

Q. I am speaking of—

BY MR. SYKES:

Q. What do you mean by "extra equipment"?

A. A raft, a lifejacket, signaling equipment—a berry pistol, I mean—and, oh maybe even a parachute—part of anything that is normally issued to a single seater military aircraft.

BY MR. KELSEY:

Q. Are you speaking of daytime or nighttime now?

A. Daytime also.

Q. Daytime also?

A. Of course, it's easier in the daytime and the prob-(tr. 254) ability is better in the daytime, but, even so, a man in the water without any special equipment is not a good target.

* * *

CAPTAIN JOHN R. McINTYRE

(tr. 372) * * *

Q. You told us that at Carysfort Light the vessel was being set in; at Mollasses Light the vessel was being set in; at Alligator Light the vessel was being set out; Tennessee Light, it was being set in; Sombrero Light, it was being set out; American Shoal Light, it was being set in; Sand Key Light, it was being set out; Cosgrove Light, it was being set out; Rebecca Light, it was being set out. Now, will you tell us what that indicates with reference to the nature of the currents that were being encountered as the vessel proceeded along that particular section of the coast?

A. Well, it indicates that on certain legs of the voyage—

(tr. 373) Q. Keep your voice up.

A. I say it indicates on certain legs of the voyage that the vessel had encountered currents that were setting the vessel offshore and, in other legs, it was setting it inshore.

* * *

Q. Captain, let me rephrase the latter part of my question, then. If you had been master of the BULKCRUDE under those circumstances, what would you have done, sir, with reference to going back to look for Mr Gardner?

A. Well, on completion of the search, not finding the man, I would have sent a radio to the Coast Guard notifying them of the circumstances and conditions and known (tr. 378) facts and, of course, I would very carefully have considered all the circumstances surrounding this case, and from what I can see, there would be no possible hope of—not knowing what time a man disappeared as to where to look for him, without having an object in view, that is, a definite place to go where to look, there would be no good

served in turning the vessel around because you would be going back aimlessly, not knowing where to look.

Q. Do I gather from your answer that you would not have gone back?

* * *

Q. Captain, so that I will understand it—everybody seems to understand it but me—would you have gone back? That is the question I want an answer to.

A. No.

* * *

Q. Captain, coming to one other thing you mentioned. I gave you the circumstances of Mr. Gardner's disappearance, the fact that he could not be located aboard. Assuming you were master of that ship and assuming that it had been reported to you at 2340 on December 8, 1958, that Mr. Gardner could not be found to stand his midnight watch, and let's assume further that you had called some of your officers and crew together to make a search for him, would you or would you not have stopped your vessel at its 2340 position on December 9th while that search was being made, sir?

A. No, I wouldn't have stopped the vessel.

* * *

Q. All right, sir. Now, Captain, if you had been master of this ship under the circumstances that I have outlined, would you have thought there was any reasonable probability of finding Robert Gardner if you had turned back, sir?

A. Well, after examining the facts that were made known to me, the course and position of the ship—the position is unknown—the time—where the man disappeared from, I can—unless you had a point, an object to look for I don't see how you could possibly find him, and the chances of finding him are extremely remote—very re-
(tr. 389) mote, in the darkness, together.

* * *

CAPT. WALTER N. PRENGEL

* * *

BY MR. SYKES:

Q. Would you have turned around, Captain, is the question I asked you, if you had been master of the BULKCRUDE, under those circumstances?

A. Absolutely not.

* * *

Q. Now, Captain, one other question along that line. If you had been master of the BULKCRUDE and it had (tr. 470) been reported to you at 2340 that they could not find Mr. Gardner for the twelve midnight watch, would you have stopped the vessel at that point to make your search or would you have continued on while making your search?

A. If I was master of the BULKCRUDE, I would not have stopped my ship, for one reason. At first, I'd have to make a search of the ship to really find if the crew member was missing. In my experience, we have had crew members missing that were found in other quarters, that were found playing cards, found asleep in the lifeboats, found asleep on the mast tables, found asleep in the storerooms, but it had taken quite a few hours before we'd find them, but as far as retracking my ship back—he might have been lost—the crew member might have been lost anywhere from six o'clock to 11:40 at night, and after I completed my search, I'd notify the Coast Guard, and from six o'clock at night to 11:40 it was a distance of over eighty-five miles. I do not know when this man went overboard; I do not know where; and I, as master, where

am I going to look for this crew member that's missing in the sea?

* * *

CAPT. HAROLD B. ADAMS

* * *

(tr. 505) * * *

BY MR. SYKES:

Q. Now, Captain, with the assumptions that I have asked you to make and if you had been master of that vessel, would you have turned your vessel around to go back and look for Mr. Gardner, under those circumstances?

A. No, no.

Q. You would not? Would you tell the Court why you would not have gone back?

A. Well, I would have investigated the crew to determine when the man was last seen, and according to the logbook, it was off Tennessee Reef about six o'clock in the evening, and it was now in the neighborhood of one o'clock in the morning, after we had determined—completed a search; that I had advanced probably a hundred or more miles. It was a dark night. If I'd have turned around and gone back, it would be daylight by the time I got back to the assumed position, but due to the Gulf Stream and the tidal current, the question would have been where was the man if he had gone overboard, and I didn't have any evidence to show that—to pinpoint where a man had gone overboard or had, in any way, shape, manner or form—in other words, it would have been purely specula-

(tr. 506) tion on my part, and it would have been so remote possibility that I would have kept right on.

* * *

Q. Captain, from your experience in going to sea and your experience in matters of this type, if it had been reported to you as master of this vessel that the man had been called for his twelve to four watch and could not be found, would you have stopped your vessel at that time to make your search; and if not, just what would you have done?

A. No, I wouldn't have stopped my ship to make this search.

* * *

CAPT. GLEN CHAFFIN

* * *

Q. You were still being set out. Captain, from your (tr. 579) testimony, it is clear that at some lights you were being set in and at others you were being set out. Does this set have any connection with the currents at all; and if so, what connection does it have? What does it indicate with reference to the currents?

A. It indicates that certain places along the Florida reefs you'll set in and certain places you'll set out. It's consistent every trip. The sets will change from trip to trip.

Q. Does that indicate a variable current in that region?

A. A variable current, yes, sir.

* * *

Q. That is all, sir. Now, Captain, did you interrogate any other members of the crew as to whether anybody else

had seen him; and if so, whom did you interrogate and what information did you receive, sir?

A. Every man on the ship was asked at the last time he had seen Mr. Gardner.

* * *

(tr. 594) * * *

BY MR. SYKES:

Q. Did your ship pick up that all ships broadcast?

A. Yes, sir, we did.

Q. Now, Captain, after those messages were sent or after you completed your search—let me put it that way—did you give consideration to turning your vessel back to look for Mr. Gardner?

A. Yes, sir, I did.

Q. All right, sir. Now, tell us what consideration you gave; what factors did you consider?

A. Well, I plotted the—already had the position—approximate position of where he was last seen and I had the position we were at the present time, which was a time elapsed of seven hours and was roughly a hundred miles, or slightly more, and there was no reasonable probability in turning back on a dark night, such as it was, to try and search for a man that had been—that we didn't know where he went overboard. We didn't know whether he did go overboard or not. We weren't sure of anything. We had no position to search, no place to search, and in our search, we found that his work shoes, his work clothes, (tr. 595) were not there. If he had went over the side, he apparently went over with these clothes on, and they were a heavy pair of work shoes, and if he'd have escaped the screw, which, as we all know, has a very great suction, he was in shark infested and barracuda infested waters,

and it was—there just wasn't—it was beyond any reasonable—it wasn't reasonably practical that he would—that he would—there would be any chance of finding him.

* * *

CWO ERNEST L. FULLER

* * *

Q. Why didn't you dispatch a ship to that area, that vicinity, that night?

MR. POST: Note my objection.

A. There are several reasons. No. 1: It was nighttime. I will come back and elaborate a little more later. No. 2: There was a time element involved. They said that had last (d. 11) seen the man, I believe, about six o'clock in the evening. That was in the vicinity of Tennessee Reef. This was around one, which was a period of almost seven hours later. Not having any specific point to look for a man overboard, it is impractical at night. It is hard enough to find a man in the water in the daytime, let alone at night. Therefore, there were no units dispatched to look for this man. Had we had a specific area to look for, we would have sent a plane come daylight the next morning. That is the usual procedure; but not having any definite position to look for him, we don't—I mean we can't go and cover the whole ocean looking for a man in the water, out in the dark there, and having no light or signal apparatus.

You have to assume the man fell overboard. If he did fall overboard, naturally he wouldn't prepare himself before he did. So nothing was sent to look for him. We did all we could in this matter, which was to put out an All Ships broadcast with the vaguest remote possibility that some ship might stumble on him.

* * *

Q. (By Mr. Humkey) Referring to Respondents' Exhibit 3 for identification, which is the All Ships bulletin or dispatch from the United States Coast Guard office in Miami, how many times did that go out to ships in the vicinity?

A. This is something—I never thought of it.

COMMANDER DAVENPORT: It is up here (indicating).

THE WITNESS: Yes. This was sent out three times, broadcast three times; immediately on receipt by the radio station and twice after that on the hour.

Title 46 U. S. Code Section 688:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."